IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 17, 2007

STATE OF TENNESSEE v. DENNIS EDDINS

Appeal from the Circuit Court for Lincoln County
No. S0500040 Jerry Scott, Judge

No. M2006-02315-CCA-R3-CD - Filed November 14, 2007

The defendant, Dennis Eddins, was convicted of extortion, *see* T.C.A. § 39-14-112, and the trial court imposed a two-year sentence to be served as six months' incarceration followed by community corrections. In this appeal, the defendant asserts that the State engaged in prosecutorial misconduct and that the trial court erred by denying his motion for a judgment of acquittal following the close of the State's proof. Because the evidence was insufficient to support the conviction, the judgment of the trial court is reversed and the charge is dismissed.

Tenn. R. App. P. 3; Judgment of the Circuit Court Reversed and Dismissed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Karla D. Ogle, Fayetteville, Tennessee, for the appellant, Dennis Eddins.

Robert E. Cooper, Jr., Attorney General & Reporter; Renee W. Turner, Assistant Attorney General; W. Michael McCown, District Attorney General; and Melissa Thomas and Ann Filer, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

In September 2004, the defendant applied to the South Central Human Resource Agency ("the Agency") for heating assistance. After receiving information from a friend that his application had been denied, the defendant telephoned the Agency and left a message on the voice mail system. Debbie Hopkins, a receptionist at the Agency, listened to the message on January 4, 2005. Believing the message to be a threat toward the Agency, Ms. Hopkins replayed the message for her supervisor, John Ed Underwood. According to Ms. Hopkins, the defendant identified himself by name and warned that he "personally . . . would see to it" that the Agency would never move into its new building and would not receive any further funding. Mr. Underwood telephoned the police, who came to the Agency and listened to the message. During Ms. Hopkins' testimony, a tape recording of the message was played for the jury.

On the tape, the defendant's tone is not overly aggressive; he sounds upset but not enraged or out of control. He does not raise his voice, and instead speaks in a calm and deliberate manner. He starts the message with a simple, "Hi, my name is Dennis Eddins," and states that he is calling in regards to his application for energy assistance. He says he has heard "in the community" that his application has been denied and that his "income level does not warrant that." The defendant states that he has "been discriminated against before and if [he is] discriminated against again" he will "personally see to it that [the Agency is] not allowed to move into [their] new building and that [they] never receive any more funding." He ends the call with a "Thank you."

The Agency's Deputy Director, John Ed Underwood, testified that the Agency coordinates 21 social service programs offering a variety of assistance to mostly low income individuals and senior citizens. One of those programs offers energy assistance to low income individuals. Mr. Underwood recalled that the defendant had visited the Agency on a number of occasions and had even applied for jobs. Mr. Underwood telephoned the police because the defendant's message was "an idle threat to us. And we didn't want anything to happen to anybody or anything." Mr. Underwood conceded that the defendant did not threaten to harm any individual employee but stated that he understood the defendant's message as a threat to burn down the building.

Fayetteville Police Department Detective Joel Massey responded to the call from the Agency and listened to the message with Mr. Underwood and Ms. Hopkins. After interviewing Mr. Underwood and Ms. Hopkins, who felt threatened by the message, Detective Massey obtained a copy of the defendant's application for heating assistance and of the defendant's telephone records. The telephone records established that the telephone call to the Agency was placed from the same telephone number the defendant listed on his application. Detective Massey testified that, as a result of the defendant's threat, the Agency's new location was placed under extra police patrol. When asked if he believed the Agency was in immediate danger, Detective Massey responded, "Probably wasn't, but we wasn't sure of that." The detective conceded that he did not speak to the defendant before bringing charges against him.

Agency employee Brenda Bass testified that she assisted the defendant with his application for energy assistance and informed him that he would be notified of the Agency's decision by letter. She stated that she did not know whether the defendant had ever received a letter regarding his application. She acknowledged that no one at the Agency informed her that the defendant posed a threat.

Regina Whitworth, the coordinator of the Agency's Low Income Heating Assistance Program, testified that energy assistance was granted on a points basis, with points assigned for income, energy burden, and the number of children or elderly individuals in the household. A computer program was used to prioritize the awarding of assistance based on points. Ms. Whitworth stated that the Agency usually does not have enough funds to serve all applicants. She stated that every applicant receives a letter that states whether funding has been approved or denied. Ms.

Whitworth recalled that she was not informed of the defendant's voice mail until she was subpoenaed to testify at his trial.

The defendant, who admitted that he had placed the telephone call to the Agency, claimed that a friend told him that his application for heating assistance had been denied. Because he had not received any formal notification from the Agency, he telephoned to check the status of his application. He stated that he was informed that a decision had not yet been made and that he was instructed to call back one week later. When he called back, he was connected to the voice mail system and left the message that is at issue in this case. The defendant testified that he felt that the Agency had discriminated against him because, despite applying for three consecutive years, he had not received any heating assistance. The defendant conceded that he was upset when he placed the call not only because he had been denied assistance but also because he felt like the Agency had inappropriately published his private information. The defendant stated that although he knew that the Agency intended to relocate, he did not know the location of their new building. The defendant conceded placing the call on New Year's Eve but denied purposely calling at a time when no one would be there, explaining "I worked on December 31st in previous years. I didn't know what their holiday schedule was."

I. Denial of the Motion for a Judgment of Acquittal

The defendant first contends that the trial court erred by denying his motion for a judgment of acquittal. He specifically contends that the State failed to establish that he intended to take criminal action against the victim. Initially, we note that the defendant chose to offer proof following the trial court's denial of his motion for a judgment of acquittal. As such, he has waived his right to appeal the denial of his motion. *See Finch v. State*, 226 S.W.3d 307 (Tenn. 2007) (declining to revisit the waiver rule promulgated in *State v. Mathis*, 590 S.W.2d 449, 453 (Tenn. 1979)); *see also State v. Johnson*, 762 S.W.2d 110, 121 (Tenn. 1988); *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). Accordingly, our review of the sufficiency of the evidence is not based solely on the evidence offered during the State's case-in-chief but must also necessarily include the proof offered by the defendant.

When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). The rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *Winters*, 137 S.W.3d at 654.

In determining the sufficiency of the evidence, this court should neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id.* at 655. Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Cabbage*, 571 S.W.2d

832, 835 (Tenn. 1978). Significantly, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

For purposes of the present case, "[a] person commits extortion who uses coercion upon another person with the intent to . . . obtain property, services, any advantage or immunity." T.C.A. § 39-14-112(a) (2006). "Coercion" is defined as "a threat, however communicated, to . . . [c]ommit any offense; . . . [w]rongfully accuse any person of any offense; . . . [e]xpose any person to hatred, contempt or ridicule; . . . [h]arm the credit or business repute of any person; or . . . [t]ake or withhold action as a public servant or cause a public servant to take or withhold action." *Id.* § 39-11-106(a)(3). "Because the harm is the use of coercion for the above purposes, the offense is committed even though the offender's efforts are unsuccessful . . . ." *Id.* § 39-14-112, Sentencing Comm'n Comments.

In this case, the proof established that the defendant left a voice mail message at the Agency wherein he stated that he would make sure that they did not move into their new building and that their funding was cut. Although the State theorized that the defendant threatened to burn the new building, he made no statement about committing arson or any offense. Moreover, the State offered no evidence that the defendant threatened to commit *any* criminal offense. In addition, the State offered no proof that the defendant wrongfully accused personnel of the Agency of an offense, threatened to harm the business reputation of the Agency, or threatened to expose anyone at the Agency to hatred, contempt, or ridicule. Further, because the defendant clearly does not qualify as a public servant, the State failed to prove that he threatened to take or withhold action as a public servant. Finally, even if it could be said that the State established that the defendant threatened to "cause a public servant to take or withhold action," the telephone message did not evince an intent to "obtain" property, services, any advantage, or immunity. The defendant's general declaration to make sure that the Agency's funding was cut is not sufficient to establish the element of coercion. The defendant's act in leaving the message, although ill-advised, simply does not rise to the level of extortionary conduct. In consequence, the defendant's conviction for extortion is reversed and the case is dismissed.

II. Prosecutorial Misconduct

The defendant also claims that the State engaged in prosecutorial misconduct that improperly shifted the burden of proof to the defense during its cross-examination of the defendant, by "acting aggressive and hostile toward the defendant" during his testimony, by attempting to offer testimony during the cross-examination of the defendant, and by attempting to introduce evidence that had been ruled inadmissible prior to trial. The defendant contends that the trial court should have granted a mistrial on the basis of the prosecutor's behavior during the cross-examination of the defendant. Although we have reversed and dismissed the defendant's conviction, we will address this issue to facilitate any further appellate review.

In reviewing allegations of prosecutorial misconduct, this court looks to see "whether such conduct could have affected the verdict to the prejudice of the defendant." *State v. Smith*, 803 S.W.2d 709, 710 (Tenn. Crim. App. 1990). That analysis involves consideration of five factors:

> "(1) the conduct complained of viewed in context and in light of the facts and circumstances of the case; (2) the curative measures undertaken by the Court and the prosecution; (3) the intent of the prosecutor in making the improper statement; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case."

State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984) (quoting *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)). Whether the trial court erred in allowing the complained-of conduct is reviewed for abuse of discretion. *State v. Sutton*, 562 S.W.2d 820, 823 (Tenn. 1972).

During his direct testimony, the defendant repeatedly asserted that the Agency had discriminated against him in its determination of heating assistance funding. During cross-examination, the prosecutor asked the defendant if he had any proof of the discrimination that he had described. In our view, this question did not improperly shift the burden of proof to the defendant. The question did not insinuate that the defendant should be required to prove his innocence but instead questioned the validity of the claims made during his direct testimony. That is a valid, and indeed the most essential, purpose of cross-examination. Also during cross-examination, the prosecutor stated that the State had "checked into" the defendant's discrimination claim and found that there was no merit to it. Although the prosecutor's statement was improper, the trial court sustained the defense objection. Finally, prior to trial, the trial court ruled that the State would be permitted to introduce into evidence documentation from the defendant's booking into the jail to show that the telephone number from which the call was placed to the agency was the same telephone number listed by the defendant on the booking documentation. The trial court also ruled, however, that the State would be limited to showing only the booking documentation for one specific day. During Officer Massey's testimony, the officer apparently stated the wrong date, giving the impression that the defendant had been arrested more than once. The prosecutor clarified the testimony through her questioning of the officer. In our view, there was absolutely no evidence that the prosecutor intentionally attempted to offer evidence that had been ruled inadmissible. The defendant is not entitled to relief on this issue.

CONCLUSION

The evidence is insufficient to support the defendant's conviction for extortion. Accordingly, the judgment of the trial court is reversed and the charge dismissed.

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JAMES CURWOOD WITT, JR., JUDGE